APPEAL NO. 020397
FILED APRIL 2, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 14, 2002. The hearing officer determined that the respondent (claimant) had disability resulting from the compensable injury from _____, through November 27, 2001. The appellant (carrier) has appealed, urging that the hearing officer erred in determining disability and in denying the carrier's request to add an extent-of-injury issue. The claimant filed a response, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury, bilateral carpal tunnel syndrome (CTS), on _____. The claimant testified that she had performed data entry and typing tasks for the employer; that she earned $11.29 an hour working 50 hours a week for the employer; that she was placed on certain work restrictions from January 11 through November 28, 2001, and the employer did not accommodate those restrictions; that she worked for a temporary agency at $10.00 an hour, 20 hours a week, from February 13 through March 23, 2001; and, that she stopped working for the temporary agency on March 23, 2001, because of the pain in her hands.

ABUSE OF DISCRETION

The carrier contends that at the benefit review conference (BRC) the parties argued both the issues of extent of injury (the claimant's other upper extremity diagnoses) and disability, but the benefit review officer's report listed only the disability issue. The carrier states that it timely filed a request to add the extent-of-injury issue pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(e) (Rule 142.7(e)).

On January 9, 2002, the hearing officer denied the carrier's request to add an extent-of-injury issue, stating simply that the carrier had not shown good cause. The hearing officer's decision not to add the requested issue under Rule 142.7 is reviewed under an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 941178, decided October 19, 1994. Review of the record reflects that the BRC report itself does not contain evidence that an issue of extent of injury was identified as unresolved, although the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated October 30, 2001, indicates that "[t]he Carrier denies the injury extends to include left medial and lateral tennis elbow, left rotator cuff tendinosis and ganglion cysts." At the CCH, the hearing officer admitted as Hearing Officer's Exhibit No. 3 the carrier's request and the hearing officer's order denying the addition of an extent-of-injury issue. The record does not indicate that the hearing officer further ruled at the hearing on the extent-of-injury issue request. The carrier contends that the hearing officer should have added the extent-of-injury issue before determining that CTS, rather than other

medical conditions, was a producing cause of the claimant's disability. We do not agree. The Appeals Panel has held that to establish disability, a claimant need only prove that the compensable injury is a cause of the inability to earn the preinjury wage, not the sole cause of that inability. Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996. Simply because a carrier presents evidence of a preexisting injury or condition does not automatically mean that the carrier is asserting a sole cause defense. Texas Workers' Compensation Commission Appeal No. 951608, decided November 10, 1995. It is the carrier, not the claimant, who has the burden to prove that some cause other than the employment was the sole cause of the claimant's injury. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 012895, decided January 14, 2002. The claimant need only prove that the CTS was a producing cause of the disability. The record does not indicate that the carrier was precluded from raising and urging a sole cause defense to establish that other conditions caused the claimant's disability. We do not find abuse of discretion on the part of the hearing officer in determining that there was no good cause shown for the carrier's request to add an extent-of-injury issue, since the carrier was given the opportunity to establish a sole cause defense. *See* Texas Workers' Compensation Commission Appeal No. 961398, decided August 28, 1996, and Texas Workers' Compensation Commission Appeal No. 961846, decided November 4, 1996, for a discussion of the principles involved in ascertaining abuse of discretion for a hearing officer's failure to add an issue.

DISABILITY

The carrier has appealed the hearing officer's determination regarding disability. Disability is defined as the inability to obtain and retain employment at wages equivalent to the preinjury wage due to a compensable injury. Section 401.011(16). It is well-settled that a claimant has the burden of proving, by a preponderance of the evidence, that she sustained disability as a result of a compensable injury. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993; Texas Workers' Compensation Commission Appeal No. 93143, decided April 9, 1993. Disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence and decides what facts the evidence has established. The hearing officer's determination that the claimant did have disability from January 11 through November 27, 2001, as a result of the compensable injury is supported by the claimant's testimony, evidence of her earnings, and medical evidence in the record. Nothing in our review of the record demonstrates that the hearing officer's disability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 N. ST. PAUL STREET
DALLAS, TEXAS 75201.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge